IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 16TH JULY 2007 / 25TH ASHADHA 1929

SA.No. 926 of 1996()

AS.6/1992 of ADDL. DISTRICT COURT, N.PARAVUR
OS.424/1988 of MUNSIFF COURT, PERUMBAVOOR

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APPELLANT(APPELLANT-DEFENDANT):

MOHANAN, SON OF KUMARAN, MADATHUMALIL HOUSE,
PUNNAYAM KARA, ASAMANNOOR VILLAGE, KUNNATHUNAD TALUK.

BY ADV.SRI.DINESH R.SHENOY
SRI.S.VIDYASAGAR
SRI.VPK.PANICKER
SRI.T.K.VENUGOPALAN

RESPONDENT(RESPONDENT-PLAINTIFF):

DIXON, SON OF ALIAS, MECHAMALIL HOUSE, METHALA KARA,
ASAMANNOOR VILLAGE, KUNNATHUNAD TALUK.

BY ADV. SRI.B.GOPAKUMAR
SMT.CHINCY GOPAKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 16/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NOS.2034/96 & 2289/96 IN S.A.NO.926 OF 1996

DISMISSED

16.7..2007 SD/- PIUS C.KURIAKOSE, JUDGE.

PIUS C. KURIAKOSE,J.

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S.A. No.926 of 1996

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Dated: 16th July, 2007

JUDGMENT

The defendant in a suit for money based on a promissory note challenges in this Second Appeal the judgment and decree of the lower appellate court dismissing the appeal preferred by him against the judgment and decree of the trial court by which the suit was decreed as prayed for. The parties will be referred to by their ranks in the trial court for sake of convenience. The suit claim was that the defendant borrowed a sum of Rs.10,000/- from the plaintiff executing a promissory note for that amount handing over to him the R.C.Book, Insurance Certificate and taxi permit belonging to the defendant's mini lorry K.E.E. 8731. The allegation was that in spite of demand, the defendant did not repay the principal amount or interest and that the defendant was trying to obtain a duplicate R.C.Book so that he can dispose of the vehicle. The suit was resisted contending that the pronote in question had not been executed and that no loan whatsoever was received by the defendant from the plaintiff. It was also contended that the defendant had acquintance with the plaintiff and that the plaintiff had no means to give any loan to the defendant.

The plaintiff's father had been conducting money lending business at Odakkali. The defendant's brother took a loan from him in 1986. The plaintiff's father tried to realise interest at the rate of 72% from the defendant's brother. The defendant intervened in the matter and caused the claim for interest to be reduced to 24%. On account of this the plaintiff's father became inimical towards the defendant and managed to take away from the defendant's mini lorry, the R.C.Book, permit and the insurance policy while the vehicle remained parked near his bank with the connivance of one Yacob who himself was conducting a private bank in the adjacent room. The promissory note in question was fabricated in the handwriting of the above said Yacob. On coming to notice the loss of R.C.Book and other papers by the end of July, 1988, the defendant had published advertisement in a newspaper about the loss of the R.C.Book. The R.C.Book and other papers were never handed over to the plaintiff by the defendant as security or otherwise.

2. The learned Munsiff formulated the following issues for trial:

1. Whether the document dated 9.2.1987 is a valid and properly constituted promissory note?

2. Whether the plaint pronote is executed by the defendant?

3. Whether the pronote is supported by consideration?

4. Under what circumstances the plaintiff came into possession of the R.C.Book? and

5. Reliefs and costs.

The evidence in the suit consisted of documents Exts.A1 to A4 and evidence of P.Ws. 1 to 3 on the side of the plaintiff and D.W.1 on the side of the defendant. The learned Munsiff on evaluating the evidence answered all the issues in favour of the plaintiff and accordingly decreed the suit with costs.

3. In appeal the lower appellate court formulated the following issues for consideration:

"Whether the appellant had received the amount as alleged in the plaint after executing Ext.A1 pronote and whether the finding of the lower court that Ext.A1 pronote is genuine is supported by legal evidence and whether the same calls for any interference by that court."

On reappreciating the evidence and considering the arguments

addressed on behalf of the parties, the lower appellate court also see no reason to differ with the trial court and accordingly confirmed the judgment and decree and dismissed the appeal, however, without any order as to costs.

4. In this Second Appeal the following are the substantial questions of law which have been suggested as arising for decision:

1. Whether the testimonies of the plaintiff's witnesses are vitiated by the fact that answers on material points are elicited by putting leading questions suggesting the answers required by the plaintiff?

2. Whether the trial of the case and the judgments of the lower courts are vitiated by the introduction of evidence on facts which are not pleaded in the plaint or written statement?

3. Whether the judgments of the lower court are vitiated by omitting to take note of the fact that the plaintiff who testified that the consideration for Ext.P1 promissory note was advanced by him, with money drawn from his bank account on that day,

failed to produce his bank account or any other document to show that he was possessed of funds to pay the amount shown in the promissory note to the defendant?

4. Whether the non-production of any documentary evidence by the plaintiff to substantiate his oral testimony that he had funds obtained by prizing a chitty and that was used by him for advancing loan to the defendant, does not lead to a legal inference that his testimony is false?

5. Whether the judgments of the lower courts are not vitiated by omission to take note of material facts and assuming facts which are not pleaded or proved?

6. Whether the judgments of the lower courts are not vitiated by the fact that they have not bestowed any consideration on the question whether the signature in the promissory note is that of the defendant? and

7. Whether the findings of the lower courts are not manifestly unjust?

5. I have heard the submissions of Mr.S.Vidyasagar, counsel for the appellant and also those of Mr.B.Gopakumar, counsel for the respondent.

6. Mr.Vidyasagar was permitted to make submissions even beyond the contours of the jurisdiction of this court under Section 100 and on the basis of such permission, learned counsel would take me to the plaint, the written statement and the testimonies of P.Ws.1, 2 and 3 and also that of D.W.1. Counsel would address me elaborately on all the grounds raised in the Second Appeal memorandum particularly the substantial questions of law suggested in the memorandum. In deference to the counsel, I have also gone through the judgments of the trial court and the lower appellate court apart from reading the testimonies. I do not find any reason to vary the decision concurrently taken by the trial court and the lower appellate court. I cannot agree that the appreciation of the oral evidence by the courts below has been tainted to the extent of justifying interference by this court under Section 100 C.P.C. The

circumstances highlighted by the appellant are not sufficient to justify interference with the concurrent views taken by the courts below based as they are on the evidence on record which has been properly appreciated. After all in civil cases the rule is not one of absolute proof but what is required is only a mere preponderance of probability. That principle, according to me, has been kept in mind by the courts below. All the questions of law formulated in the Second Appeal will have to be answered against the appellant. The Second Appeal fails. However, on considerations of indulgence I reduce the rate of pendente lite interest presently allowed at 18% to 6% per annum. The decree passed by the courts below will stand modified to that extent only. In all other respects the judgments and decrees under appeal will stand confirmed. The Second Appeal is dismissed. But in the circumstances without any order as to costs.

srd **PIUS C.KURIAKOSE, JUDGE**